2010

Nicholas Lindsey v. Unifund CCR : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

NICHOLAS LINDSEY, Appellant, vs. UNIFUND CCR, Appellee.	**Appellate Court No. 20100794 -CA**

REPLY BRIEF OF THE APPELLANT

APPEAL FROM THE JUDGMENT OF THE SECOND DISTRICT COURT, DAVIS COUNTY, ENTERED AUGUST 20, 2010

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I. STATEMENT OF DISPUTED FACTS

The Statement of the Case and Facts in the Plaintiff's opposing brief alleges that the Defendant "omitted certain key facts." Pl. Br., p. 1. Listed below in the left hand column are the "omitted facts" or the corrected version of facts asserted by the Plaintiff. The right hand column contains the Defendant's rebuttal.

Plaintiff's Allegations	Defendant's Rebuttal
1. Plaintiff obtained two separate judgments, the last one being the December 22, 2009 Default Judgment. (AR 194) On January 8, 2010, Defendant moved to set aside that Judgment. (AR 205) The District Court inadvertently granted conflicting orders before hearing Defendant's motion, including the March 25, 2010 Order Setting Aside the Default Judgment and Dismissing the Action with Prejudice. (AR 276) Pl.Br., p. 1.	The record plainly discloses that the District Court did not inadvertently grant two conflicting judgments. Defendant moved to set aside the second default judgment, and the district court granted that motion with its March 25, 2010 order granting Defendant's Motion to Set Aside and dismissing the action with prejudice. This was a final order which was never appealed by the Plaintiff. Def.Br., p. 9.

2. Therefore, Plaintiff filed a Motion to Reopen and Reinstate Judgment. (AR 286) The District Court set a June 28, 2010 hearing as to Plaintiff's motion to reopen and reinstate, but not as to Defendant's motion to set aside. (AR 307) Pl.Br., p.1.	Plaintiff's motion was a direct attack on the merits of the Defendant's January 8, 2010 Motion to Set Aside the Default Judgment, and an attack on the March 25, 2010 final order. Thus, the District Court's scheduling of a hearing on the Plaintiff's Motion to Reopen and Reinstate necessarily required reconsideration of the merits of the Defendant's January 8, 2010 Motion to Set Aside.
3. At the hearing, the District Court recognized that it needed to resolve the conflicting orders. (AR 322; AR 374)	There is nothing in the record to support this contention. At the June 28, 2010 hearing the only dispositive order before the district court was the March 25, 2010 final order. (Note: the transcript of this hearing states it was before Judge Hansen, but the hearing was before Judge Thomas L. Kay.)

4. Although the hearing was supposed to be limited to Plaintiff's motion to reopen and reinstate, the District Court nevertheless also considered certain arguments raised in Defendant's motion to set aside. (*Id.*) Pl.Br., p. 1.	Issue wise, the Plaintiff's Motion to Reopen and Reinstate, and the Defendant's Motion to Set Aside were flip sides of the same coin, meaning that one could not be considered without considering the other.
5. The hearing certainly was not directed to any dispositive motion on the merits; the record shows that parties did not file any such motion. Pl.Br., pp. 1-2.	Dismissal of a case with prejudice disposes of the case on the merits. The March 25, 2010 final order dismissed the action with prejudice. Plaintiff's Motion to Reopen and Reinstate sought to set aside that final order, and that order was the result of the Defendant's January 8, 2010 dispositive motion. Clearly, the June 28, 2010 hearing was directed to a dispositive motion.

6. Because the hearing was only directed to Plaintiff's motion to reopen and reinstate, the arguments raised in Defendant's motion to set aside were not set to be heard. Pl.Br., p. 2.	See the rebuttal to four (4) above.
7. Nevertheless, at the June 28, 2010 hearing, the District Court dismissed the case with prejudice without any dispositive motion being filed or full briefing and argument on the merits (stating, however, that the District Court would be open to reconsideration if Plaintiff could provide further authority). (AR 336; AR 374) Pl.Br., p. 2.	As to the assertion that the District Court dismissed the case with prejudice without any dispositive motion being filed, see the rebuttal to two (2), four (4), and five (5) above. Defendant fully briefed the issues and, as is shown at AR 375, pp. 16:23-17:7, Plaintiff had repeatedly been unprepared in response to the Defendant's briefing. For example, Plaintiff's memorandum opposing the Defendant's January 8, 2010 Motion to Set Aside contains only one-half page of argument. AR 238.

8. Plaintiff's counsel was therefore unable to advise the District Court during that hearing that the primary case on which Defendant relied, *Castro v. Collecto, Inc.*, 256 F.R.D. 534 (W.D. Tex. March 4, 2009), had been reconsidered and withdrawn by the issuing federal District Court on October 27, 2009, well before Defendant's January 8, 2010 motion to set aside. Pl.Br., p. 2.	The June 28, 2010 hearing was the result of the Plaintiff's Motion to Reopen and Reinstate which sought to set aside the March 25, 2010 final order. Defendant cited and relied upon *Castro v. Collecto, Inc.*, 256 F.R.D. 534 (W.D. Tex. March 4, 2009) in his January 8, 2010 Memorandum in Support of Defendant's Motion to Set Aside Judgment. AR 207. But Plaintiff entirely failed to address *Castro* in its opposing memorandum, AR 238, or in its memorandum in support of Plaintiff's Motion to Reopen and Reinstate Judgment, AR 287. Although, in its reply memorandum in support of that motion it did cite to the revised decision, *Castro v. Collecto*, Inc. 668 F.Supp.2d 950 (W.D. Texas

	2009), which held that the longer state statute of limitations applied, at the June 28, 2010 hearing the District Court repeatedly asked Plaintiff why Defendant's arguments regarding *Castro* were wrong, but Plaintiff could not answer. AR 375, pp. 8:4-13; 10:12-19; 11:10-16:18.
9. Notably, the District Court did not enter a final order dismissing the case until July 28, 2010, one month after the June 28 hearing. (AR 336) Pl.Br., p. 2.	The July 28, 2010 order denied the Plaintiff's Rule 59 motion, AR 286, attacking the March 25, 2010 order setting aside the default judgment and dismissing the action with prejudice. AR 336.
10. Plaintiff filed a motion to reconsider on July 9, 2010. (AR 323) In that motion, Plaintiff advised the District Court that, both	As was shown above in number eight (8), it was Plaintiff – after reciting to the revised *Castro* decision in its reply memorandum, AR 309, which

during briefing and at the June 28, 2010 hearing, Defendant failed to advise the District Court of the subsequent October 2009 decision in *Castro*. Pl.Br., p. 2.	repeatedly failed to cite to or quote from that decision at the June 28, 2010 hearing and instead repeatedly conceded that Plaintiff could not presently put before the Court case authority rebutting Defendant's arguments regarding *Castro*. AR 375, pp. 8:4-13; 10:12-19; 11:10-16:18
11. Plaintiff therefore requested that the December 21, 2009 Default Judgment be reinstated. On August 20, 2010, after reviewing the correct Castro decision, and after reviewing the applicable case law regarding the District Court's inherent authority to modify its own orders, the District Court reopened the case and reinstated the previous default judgment against Defendant. (AR 358) Pl.Br., p. 3.	Plaintiff's July 9, 2010 Motion to Reconsider was its second attempt at setting aside the March 25, 2010 order. The District Court's July 28, 2010 order effectively denied that motion. The District Court's inherent authority is limited by the jurisdictional time limits imposed by Rule 59 and Rule 60(b). And there is nothing on the record to show why the District Court signed the August 20, 2010 order.

II. THE DISTRICT COURT LOST JURISDICTION OVER THE PLAINTIFF'S COMPLAINT

A. When Plaintiff Let the 120 Days For Service Lapse, the District Court Lost Jurisdiction over the Plaintiff's Complaint. Plaintiff asserts that it was diligent in its Rule 4(b)(i) motions for an extension of time. Pl.Br., p.13. In so asserting, Plaintiff attempts to distinguish this case from *Ayers v. Rusk*, 2008 UT App 358 (unpublished) by arguing that the facts in *Ayers* do not apply to Plaintiff because:

> None of that is true here. Service occurred only after Plaintiff moved the court to extend time for service on several occasions and each motion was granted by the court.

Pl.Br., p.10. But review of the record before this Court discloses that this is an even more egregious case than *Ayers*. On July 16, 2007 Plaintiff obtained its last order extending the time for service of its summons and complaint. AR 24.

Note that it is undisputed that the Plaintiff never served the Defendant pursuant to that July 16, 2007 Order. Accordingly, the time for the service of the Plaintiff's complaint at the latest expired on November 13, 2007. The Defendant first learned of the Plaintiff's action because his wages were garnished. When the Defendant on April 30, 2009 filed a Reply and Request for Hearing, AR 68, he asserted that the Writ of Garnishment was issued improperly because: "Notice of legal proceedings in this matter were improperly served to the wrong address." Id.

On May 6, 2009, Defendant then filed his Motion to Set Aside the Default Judgment entered against him, alleging in that motion that he was never served with process in the action below. AR 74. The District Court granted that Motion to Set Aside on May 28, 2009. AR 87.

Recognizing that Plaintiff had never served process on the Defendant (meaning that the District Court had never acquired personal jurisdiction over the Defendant) Plaintiff again attempted service on the Defendant on June 13, 2009, AR 94, but without first obtaining a Rule 4(b)(i) order from the District Court granting a further 577 day extension of the time for service. Defendant answered on July 6, 2009, AR 96, and in that answer again alleged that he had been improperly served with process. Id. More important, even if valid personal service had been effected on the Defendant on June 13, 2009 (which it had not), the Plaintiff's complaint had expired (at the latest) a year and a half prior to June 13, 2009.

Manifestly, this case presents a much more egregious case than *Ayers v. Rusk*, at *3. There the complaint was 79 days out of time. Here, the Plaintiff's complaint had expired (at the latest) 577 days prior to June 13, 2009. Clearly, when the Plaintiff's Return on Summons, AR 94, was filed on June 24, 2009 the facts in this case came within those presented to this Court in *Ayers v. Rusk*. Moreover, when on January 8, 2010 the Defendant filed his Motion to Set Aside

the second default judgment, he argued to the District Court that the Plaintiff's complaint had expired prior to service and that this jurisdictional defect required dismissal of the Plaintiff's action. AR 215-216. This argument specifically brought to the District Court's attention the issue of the expiration of the Plaintiff's complaint prior to its June 13, 2009 service on the Plaintiff. Thus, when on March 25, 2010 the Court dismissed the Plaintiff's action, dismissal of the action was required. *See Hunter v. Sunrise Title Co.*, 2004 UT 1, ¶ 14, 84 P.3d 1163 (Utah 2004) ("A plaintiff's failure to satisfy the 120-day requirement or obtain an extension results in dismissal of the complaint as untimely, as occurred here.").

In *Hunter*, two co-defendants were served with process, but the defendant Sunrise Title was not served prior to the dismissal from the lawsuit of the two served co-defendants . Id at ¶ 12. In dismissing the Hunter's amended complaint because it was not timely served the court held that a plaintiff in Hunter's situation:

> must either (1) serve at least one unserved defendant within 120 days of the date the original complaint was filed; or (2) petition the district court for an extension prior to the dismissal of the served co-defendants, if the 120-day period has already expired. Because Hunter did neither, the district court properly dismissed his amended complaint as untimely.

On the record before this Court, on four different occasions Plaintiff let the 120 days limited by Rule 4(b)(i) lapse (i.e., October 24, 2006, February 23, 2007,

June 28, 2007, and November 13, 2007). At no time did the Plaintiff seek relief under Rule 6(b)'s excusable neglect standard, and after the fourth lapse, the Plaintiff did not even make a motion for an extension. Plainly, under the holding in *Hunter* Plaintiff's action "must" be dismissed, and the District Court's March 25, 2010 dismissal was required by *Hunter* at ¶ 12.

To evade this result, Plaintiff makes the specious argument that because it attached an affidavit of service to each of its motions for an extension of time for service of process, this brought each motion within the provisions of *Ut. R. Civ. P.* 5(b)(1)(b), which states that service is complete upon mailing. But Rule 5 by its terms only applies to service upon a party to the action. Because the Plaintiff had not yet served the Defendant he was not yet a party to the action. Indeed, Plaintiff asserts in each of its three motions to extend the 120 day time limited by Rule 4(b)(i) that Plaintiff did not know where the Defendant was residing. It is axiomatic that if the Plaintiff did not yet know where the Defendant was and could not serve him, Plaintiff could not make Defendant a party to the action. On these facts, Plaintiff could not employ the service by mail provisions of Rule 5 to evade the personal service requirements of Rule 4(d), meaning that on four different occasions the Plaintiff let the time for service of its complaint lapse.

If it is assumed that Plaintiff's first two extension motions were properly granted (which they were not) and if Plaintiff's June 29, 2007 Rule 4(b)(i) motion

had laid out facts demonstrating excusable neglect to the District Court, it may be it could have further extended the time for service of process by the Plaintiff. But where the Plaintiff's own motion papers disclosed a ten month period of neglect which was not excusable, the District Court was required, sua sponte, to dismiss the action. *See Hunter*, 2004 UT at ¶ 14; *see also Callahan v. Sheaffer,* 877 P.2d 1259 (Ut App 1994); *Ayers v. Rusk*, 2008 UT App 358. Consequently, as of June 29, 2007 the District Court lost jurisdiction over the Plaintiff's complaint and there was no action to prosecute. As soon as this was brought to the District Court's attention it was required to dismiss the action. Defendant brought this jurisdictional defect to the District Court's attention on January 8, 2010, AR 215-216, and the court properly dismissed the Plaintiff's action on March 25, 2010.

B. Excusable Neglect is Not In Issue

In each of its three motions to extend the time 120 days limited by Rule 4(b)(i) for service of its complaint, Plaintiff failed to make a motion under Rule 6(b). In *Callahan v. Sheaffer*, 877 P.2d 1259, 1262 (Utah App. 1994) this Court ruled that:

> Rule 6(b) of the Utah Rules of Civil Procedure allows the trial court discretion to enlarge the time allowed for service of summons or other actions, even after the prescribed time for such action has expired, if the appropriate motion is made and if the failure was the result of excusable neglect.

Id. But *Callahan* does not hold that the good cause standard of Rule 4(b)(i) is the

same as the excusable neglect standard of Rule 6(b). Instead, a plaintiff must specifically invoke the excusable neglect standard by making "the appropriate motion." This ruling reflects the legislative history of the corresponding federal rule (currently styled as Rule 4(m)) which, in part, notes that:

> H.R. 7154 adopts a policy of limiting the time to effect service. It provides that if a summons and complaint have not been served within 120 days of the filing of the complaint and the plaintiff fails to show "good cause" for not completing service within that time, then the court must dismiss the action as to the unserved defendant. H.R. 7154 ensures that a plaintiff will be notified of an attempt to dismiss the action. If dismissal for failure to serve is raised by the court upon its own motion, the legislation requires that the court provide notice to the plaintiff. If dismissal is sought by someone else, Rule 5(a) of the Federal Rules of Civil Procedure requires that the motion be served upon the plaintiff . . . . If the plaintiff has not been diligent, the court will dismiss the complaint for failure to serve within 120 days, and the plaintiff will be barred from later maintaining the cause of action because the statute of limitation has run . . . . If, on the other hand, the plaintiff has made reasonable efforts to effect service, then the plaintiff can move under Rule 6 (b) to enlarge the time within which to serve or can oppose dismissal for failure to serve. A court would undoubtedly permit such a plaintiff additional time within which to effect service. Thus, a diligent plaintiff can preserve the cause of action.

Rule 4(m), Notes of Advisory Committee on Rules—1980 Amendment, H.R. 7154—Federal Rules of Civil Procedure Amendments Act of 1982.

Espinoza v. U.S., 52 F.3d 838, 841 (10th Cir. 1995) clarifies the distinction between "good cause" and "excusable neglect" by holding that in cases where the plaintiff shows good cause for extension of the 120 days, the court "shall" extend

the time period for service. Stated differently, the extension is mandatory if the plaintiff can show good cause. But if the plaintiff cannot show good cause, and if a plaintiff includes in a motion for an extension of time under *Fed. R. Civ. P.* 4(m) a request for relief under Rule 6(b), the court has discretion whether it will extend the 120 days for service of process. *Cf. Ayers* at *3 (distinguishing the more liberal federal rule from the more stringent Utah rule).

Ut. R. Civ. P. 4(b) is derived from *Fed. R. Civ. P.* 4(m) (formerly Rule 4(j)) and the *Callahan* decision adopts the same procedural device employed in *Fed. R. Civ. P.* 4(m) for the use of Rule 6(b) in conjunction with a Rule 4(b)(i) motion. *Callahan* at 1262. However, Plaintiff never requested relief under Rule 6(b). As this Court ruled in *Callahan*, to bring its motion for an extension of the 120 days for service within the excusable neglect standard of Rule 6(b) "the appropriate motion [must be] made and [] the failure [must be] the result of excusable neglect." *Callahan* at 1262. Plaintiff's failure to make a motion under Rule 6(b), means that the Plaintiff did not invoke the court's discretion under Rule 6(b) to grant an extension of the 120 days limited by Rule 4(b)(i) for service of process. A court's jurisdiction must be invoked by the procedures and on the grounds specified in law. *See Palmquist v. Palmquist*, 6 Utah 2d 294, 295-296, 312 P.2d 779 (Utah 1957) (trial court erred in exercising its discretion to stay a judgment where no grounds existed for a stay). In short, unless in making its Rule 4(b)(i)

motion the Plaintiff invoked Rule 6(b) it cannot claims the benefit of that rule and is bound by the good cause standard in Rule 4(b)(i).

C. Even Under An Excusable Neglect Standard, Dismissal of the Plaintiff's Action Was Required. In any event, the Plaintiff failed to satisfy the excusable neglect standard. In the Defendant's opening brief he showed that the Plaintiff not only did not show good cause for any of the three extension's granted to him, but the Plaintiff's own motion papers submitted to the District Court for the third extension disclosed that there was an unexplained ten month lapse in any attempt to serve the Defendant. The inference is that if the Plaintiff had any explanation for the ten month lapse other than blatant neglect, it would have presented that explanation to the District Court. The Plaintiff's disclosure of its ten months of neglect also demonstrates that its second motion for an extension of time for service was the result of neglect. Def.Br., pp. 18-21.

In short, Plaintiff's own motion papers filed with the District Court disclose that at least two of its three motions for an extension of the time for service were the result of Plaintiff's inexcusable neglect, and all three motions are devoid of any factual assertions establishing grounds for an extension under either an excusable neglect or good cause standard. Thus, even if Plaintiff's failure to request relief under Rule 6(b) is ignored and it is assumed that an excusable neglect standard governed each of the three Plaintiff's motions for an extension of

time under Rule 4(b)(i), Plaintiff's own motion papers establish that the last two motions were the result of inexcusable neglect. Accordingly, the Defendant's January 8, 2010 Motion to Set Aside the Default Judgment and Dismiss the Plaintiff's action required the District Court to dismiss the Plaintiff's action, because under Rule 4(b)(i):

> If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative.

Id. Although Plaintiff may complain that the March 25, 2010 order dismissing the Plaintiff's action with prejudice was erroneous in law because Rule 4(b)(i) only provides for dismissal of the Plaintiff's action without prejudice, Plaintiff's remedy for this legal error was to appeal the March 25, 2010 final order, which the Plaintiff failed to do.

III. THE DISTRICT COURT'S DISCOVERY SANCTIONS VIOLATED DUE PROCESS

Defendant's opening brief established that even if it is assumed that the District Court acquired personal jurisdiction over the Plaintiff, the District Court violated due process by imposing the severe discovery sanction of striking his answer without there being any factual showing of wilful disregard of the District Court's order compelling discovery. Def.Br., pp. 12-14. Plaintiff's sole basis for

challenging the Defendant's due process argument is its false allegation "that any failure of service was due solely to his own failure to keep the court and Plaintiffs apprised of his address." Pl.Br., pp. 7-8.

But as was shown above, when the Plaintiff realized the third Rule 4(b)(i) extension granted by the District Court on June 29, 2007 had long ago expired without the Defendant being served, Plaintiff again attempted service on the Defendant at his Roy, Utah residence. AR 94. Defendant's affidavit filed with the District Court on January 8, 2010 establishes that the Defendant was residing at the same Roy, Utah address when the Plaintiff's Motion to Compel Discovery was filed and when the District Court's Order Compelling Discovery was issued. AR 231, ¶ 10. Thus, there never any failure by the Defendant to keep the Plaintiff and the District Court apprised of the Defendant's address.

From the time that the Defendant first appeared and contested the garnishment in the action below until the action was dismissed with prejudice on March 25, 2010 the Defendant had the same address. Apparently, Plaintiff's assertion that the Defendant failed to keep the Plaintiff and the District Court apprised of his address is something the Plaintiff has plucked out of thin air.

The fact remains that the Defendant's affidavit evidence is undisputed that he never received the Plaintiff's Motion to Compel Discovery or the District Court's Order compelling discovery. Note that both the Motion to Compel and the

Order Compelling Discovery were purportedly served on the Defendant by the office of Plaintiff's counsel, AR 182 & 187, and that Plaintiff did not and does not contest the Defendant Lindsey's evidence that he never received either of these documents. Nor does the Plaintiff contest, on legal grounds, the Defendant's due process analysis and argument in his opening brief that the District Court's December 22, 2009 order striking the Defendant's answer and entering default judgment against him as a discovery sanction violated due process and that the August 20, 2010 order was void as violative of due process. Def. Br., pp. 12-14.

Consequently, the District Court's August 20, 2010 order reinstating the December 22, 2009 default judgment violated due process, and so is void as violative of due process.

IV. THE MARCH 25, 2010 ORDER DISMISSING PLAINTIFF'S ACTION WAS A FINAL JUDGMENT WHICH WAS NEVER APPEALED

Plaintiff complains that the District Court committed an error of law in dismissing its action on the basis of *Castro v. Collecto, Inc.*, 256 F.R.D. 534 (W.D. Tex. March 4, 2009) (Castro I) because that same court some six months later reversed its prior decision and issued *Castro v. Collecto, Inc.*, 668 F. Supp. 2d 950 (W.D. Tex. 2009) (Castro II). But neither decision of the federal district court in West Texas was binding on the Utah District Court as precedent, and those

decisions constituted only persuasive authority. If the District Court chose to follow *Castro I* as the better reasoned decision, and on that basis chose to follow *Castro I* over *Castro II*, there was no binding precedent preventing the District Court from doing so.

If Plaintiff believed the District Court had committed an error of law in following *Castro I*, Plaintiff's remedy was to timely appeal the March 25, 2010 final order dismissing the Plaintiff's action with prejudice. But Plaintiff never appealed, and as was shown in the Defendant's opening brief the District Court's final order precludes further litigation of that issue. Def.Br., pp. 8-12.

Plaintiff also argues that the District Court erroneously believed that *Castro I* had not been replaced by *Castro II*. If so, this is due solely to Plaintiff's default in briefing the issue. Defendant's January 8, 2010 memorandum in support of his Motion to Set Aside the January 22, 2009 default judgment fully briefed *Castro I* and the two year federal statute of repose. But Plaintiff's opposing memorandum entirely failed to address either *Castro I* or *Castro II*, AR 236. Arguments not briefed are waived. *In Matter of the Adoption of Baby E.Z., LC,* 2011 UT 38, ¶ 44 (because litigant did not raise an issue below, he waived the argument).

In footnote 1 of its brief, Plaintiff contends that the Fifth Circuit's decision in *Castro v. Collecto, Inc.*, 634 F.3d 779 (5th Cir. 2011) confirms that the District Court wrongly decided the statute of limitations issue against the Plaintiff on the

basis of *Castro I*. But in doing so Plaintiff overlooks the Supreme Court of Utah's adoption of the holding in *Federated Department Stores Inc. v. Moitie*, 452 U.S. 394 (1981). *See Collins v. Sandy City Board of Adjustment*, 2002 UT 77, ¶¶ 18-19, 52 P.3d 1267 (Utah 2002). In *Federated Department Stores Inc. v. Moitie* the court held that:

> an erroneous conclusion reached by the court in the first suit does not deprive the defendants in the second action of their right to rely upon the plea of res judicata. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected by a direct review and not by bringing another action upon the same cause [of action]. We have observed that [the] indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert. Id. at 398-99 (internal quotations, italics, and citations omitted).

Quoted in Collins at ¶ 18. Applied to Plaintiff's action, if Plaintiff believed that the District Court's reliance on *Castro I* was erroneous, its remedy was to appeal the District Court's decision. Because Plaintiff failed to appeal the March 25, 2010 final order dismissing Plaintiff's action with prejudice, that order is res judicata and that order is not subject to collateral attack by the Plaintiff. *Collins* at ¶ 19.

In an attempt to evade the finality of the March 25, 2010 order, Plaintiff incorrectly argues that the July 28, 2010 order denying the Plaintiff's Rule 59 motion, and also denying Plaintiff's motion to reconsider, was the order which disposed of Plaintiff's action on the merits, meaning that the District Court

retained jurisdiction under Rule 60(b) to reconsider its July 28, 2010 order and subsequently render its August 20, 2010 order. But, Plaintiff's April 21, 2010 Motion to Reinstate and Amend Judgment, AR 286, belies this contention by specifically relying upon and citing to Rule 59. It was obvious to Plaintiff on April 6, 2010, when Plaintiff served its Rule 59 motion, that the March 25, 2010 order had entirely disposed of Plaintiff's action. *See Pate v. Marathon Steel Co.*, 692 P.2d 765, 768 (Utah 1984) (a final order is one which entirely disposes of the claims against a party). Clearly, the July 28, 2010 order merely denied the Plaintiff's Rule 59 motion (and the Plaintiff's Motion for Reconsideration), meaning that the March 25, 2010 order was a final, appealable order.

And even if it is erroneously assumed for the sake of argument that the July 28, 2010 order was a final, appealable order, Plaintiff cannot invoke Rule 60(b) to attack that order by alleging it erroneously enforced *Castro I,* because errors of law cannot be addressed through a Rule 60(b) motion. *See Lange v. Eby*, 2006 UT App 118, ¶ 7, 133 P.3d 451 (Ut App 2006) (a timely appeal is the remedy for errors of law and a Rule 60(b) motion cannot be used to address errors of law by a trial court). Thus, Plaintiff's arguments regarding the District Court retaining jurisdiction under Rule 60(b) to set aside the March 25, 2010 final order (or the July 28, 2010 order) are wrong as a matter of law.

V. CONCLUSION

The District Court lost jurisdiction over Plaintiff's complaint at least a year and a half before the Defendant filed its Reply and Request for Hearing on April 30, 2009. Plaintiff recognized that the District Court had lost jurisdiction when it attempted to re-start its action (without requesting relief under Rule 4(b)(i)) by again attempting service on the Defendant on June 13, 2009. On that ground alone the District Court properly responded to the Defendant's January 8, 2010 Motion to Set Aside the Default Judgment by issuing its March 25, 2010 order dismissing the Plaintiff's action. Any legal error committed by the Court in dismissing the Plaintiff's action with prejudice was a matter for timely appeal by the Plaintiff.

If, somehow, the District Court retained jurisdiction over the Plaintiff's action, the March 25, 2010 final order dismissing the Plaintiff's action with prejudice was never timely appealed, and the District Court's July 28, 2010 order denied the Plaintiff's Rule 59 Motion, meaning that the District Court was without jurisdiction (both on subject matter jurisdiction grounds and due process grounds) to issue its August 20, 2010 order reinstating the Plaintiff's default judgment.

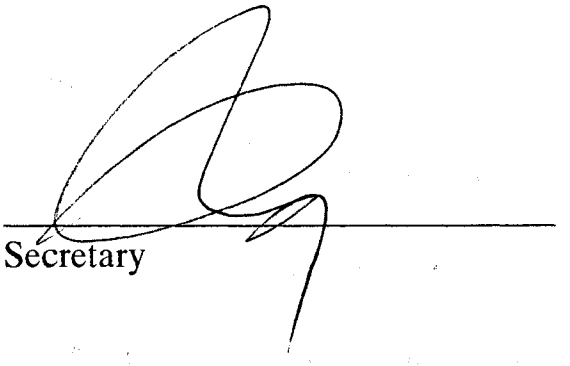
Defendant requests that an order so issue and for costs of this appeal.

DATED this 26th day of June, 2011.

RONALD ADY, Attorney for the
Appellant Nicholas Lindsey

CERTIFICATE OF SERVICE

I certify that on the 26th day of July, 2011 I deposited a true copy of the foregoing Appellants' Brief in the United States mail, first-class postage pre-paid to:



Secretary